

THE JUDICIAL
APPLICATION OF HUMAN
RIGHTS LAW

National, Regional and
International Jurisprudence

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CONTENTS

<i>Preface</i>	<i>page ix</i>
<i>Table of cases</i>	xiii
<i>Table of instruments</i>	civ

PART I **Introduction** 1

1	Historical and juridical background	3
2	The international bill of human rights	24
3	The domestic protection of human rights	95
4	The international protection of human rights	130

PART II **General principles** 157

5	Interpretation	159
6	Non-discrimination	174
7	Limitations	182
8	Derogation	202

PART III **The substantive rights** 215

9	The right of self-determination	217
10	The right to life	239
11	The right to freedom from torture	296

12	The right to freedom from slavery	353
13	The right to liberty	369
14	The rights of prisoners	425
15	The right to freedom of movement	436
16	The right to a fair trial	478
17	The rights of accused persons	527
18	The right to recognition as a person	595
19	The right to privacy	597
20	The right to freedom of thought	637
21	The right to freedom of expression	663
22	The right to freedom of assembly	721
23	The right to freedom of association	735
24	The right to family life	761
25	The rights of the child	780
26	The right to participate in public life	789
27	The right to equality	816
28	The rights of minorities	842
29	The rights relating to work	852
30	The rights relating to social security	864
31	The right to an adequate standard of living	869
32	The right to health	881
33	The right to education	890
34	The right to cultural life	904
35	The right to property	908

Historical and juridical background

International law

There has been in existence for several centuries a body of international law regulating relations between states, particularly in regard to the conduct of war and diplomatic immunity. These are principles and rules of conduct whose existence is acknowledged by states, and compliance with which is accepted as obligatory, although there is as yet no international legislature with authority to make laws applicable to states, no international police force capable of enforcing the observance of laws by states, and no international court with compulsory jurisdiction over states.

The origin of modern international law is attributed to the rise of the secular sovereign state in Western Europe following the Treaty of Peace of Westphalia 1648 that marked the end of the Thirty Years' War. But there is evidence that some of these rules were observed elsewhere in the world several hundred years previously. For instance, ancient Greek custom recognized the inviolability of the persons of envoys, the right of asylum of persons resorting to sacred places, and the sanctity of treaties, especially those concluded after a religious ceremony. In ancient China (551–479 BC), the institution of *Li* condemned the detention, arrest or murder of envoys negotiating peace. In ancient India (1367 BC), agreements between Bahmani and Vijayanagar kings provided for the humane treatment of prisoners of war and the sparing of the lives of the enemy's unarmed subjects.¹ In his treatise,

¹ Erica-Irene A. Daes, *Status of the Individual and Contemporary International Law: Promotion, Protection and Restoration of Human Rights at National, Regional and International Levels* (New York: United Nations, 1992) 15, citing Keyshiro Iriye, 'The Principles of International Law in the Light of Confucian Doctrine' (1967) 1 *Recueil des cours de l'Academie de droit international de La Haye* 8–11; Jui-Chia-Cheng, 'Ancient Chinese Political and Legal Teaching and the Modern Theory of International Law Related to the Position of the Individual in

The Arthashastra,² the Indian political scientist Kautilya (circa 150 BC) described, for instance, the nature of treaties:

Some teachers say that an agreement made on the word of honour or by swearing an oath is an unstable peace whereas one backed by a surety or hostage is more stable. Kautilya disagrees. An agreement made on oath or on word of honour is stable in this world and the next [i.e. breaking it has consequences in life and after death]. An agreement which depends on a surety or a hostage is valid only in this world since its observance depends on the relative strength [of the parties making it]. Kings of old, who were always true to their word, made a pact by [just] verbal agreement. If there was any doubt they swore by [touching] fire, water, a ploughed furrow, a wall of the fort, the shoulder of an elephant, the back of a horse, the seat on a chariot, a weapon, a gem, seeds, a perfume, liquor, gold or money, declaring that these would destroy or desert him, if he violated the agreement. If there was any doubt about the swearer being true to his oath, the pact was made with great men, ascetics or the chiefs standing as surety [guaranteeing its observance]. In such a case, whoever obtained the guarantees of persons capable of controlling the enemy outmanoeuvred the other.

The need for more precise and clearly defined rules of conduct for regulating the relationship between states arose with the emergence of the modern state system in Europe. State practice during this period drew on the writings of Hugo Grotius and several of his contemporaries who had themselves drawn on the concept of natural law in formulating the rights, privileges, powers and immunities of national entities. In the next two centuries, not only did the body of international law expand, but its philosophical base also moved from the law of nature to the positivist school. In 1899, the Permanent Court of Arbitration was established with a bureau at The Hague for the pacific settlement of international disputes, and in 1919 the Permanent Court of International Justice was constituted. In 1946, the Charter of the United Nations established the International Court of Justice as the principal judicial organ of the United Nations.³ Article 38 of the statute of the court requires it,

International Law', thesis (unpublished), Athens University (1970); R.C. Hingorani, *Modern International Law* (New York: Oceana Publications, 1984) 13–15; and Nagendra Singh, *India and International Law* 1969, 10.

² Kautilya, *The Arthashastra*, edited, rearranged and introduced by L.N. Rangarajan (New Delhi: Penguin Books India (Pvt) Ltd, 1992).

³ Article 92.

when deciding in accordance with international law a dispute submitted to it, to apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

At least three formal sources of contemporary international law are, therefore, recognized:⁴

- (i) A treaty (or international convention) results from the conscious decision of two or more states to create binding obligations between them.⁵ It becomes a source of international law when the states parties express their consent to be bound by the treaty, and the treaty enters into force.⁶ Thereupon its terms constitute for its states parties legally binding obligations in international law which must be performed by them in good faith (*pacta sunt servanda*). A party may not invoke municipal law as a reason for failure to perform a treaty obligation.⁷ While treaties may be entered into on a wide variety of subject-matter, including those in respect of which rules

⁴ For a fuller discussion of the sources of international law, see Rebecca M.M. Wallace, *International Law*, 2nd edn (London: Sweet & Maxwell, 1992), 7–33; Martin Dixon, *International Law*, 2nd edn (London: Blackstone Press Ltd, 1993), 18–67.

⁵ A treaty may also be entered into between a state and an international organization or between international organizations: see Vienna Convention on the Law of Treaties between States and International Organizations 1986.

⁶ Consent to be bound is usually expressed by ‘signature’ followed by ‘ratification’. For other means of expressing consent, see Vienna Convention on the Law of Treaties 1969, Articles 11–16. A treaty may take a number of forms and be given a diversity of names. A joint communiqué may constitute an international agreement to submit a dispute to arbitration or judicial settlement: *Aegean Sea Continental Shelf Case*, ICJ Reports 1978, 39. So would exchanges of letters between the heads of two states, and minutes signed by the foreign ministers of two states recording commitments accepted by their governments: *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) (Jurisdiction – First Phase)*, ICJ Reports 1994, 112. A treaty enters into force ‘in such manner and upon such date as it may provide or as the negotiating states may agree’: Vienna Convention on the Law of Treaties 1969, Article 24.

⁷ Vienna Convention on the Law of Treaties 1969, Articles 26 and 27.

of customary international law already exist, a treaty is void if it conflicts with 'a peremptory norm of general international law' (*jus cogens*).⁸

- (ii) International custom is a general practice observed by states in the belief that it is obligatory. Before a norm of behaviour crystallizes into a rule of customary international law, two requirements must be satisfied. The first is that within the period in question, however brief it might be, state practice, including that of states whose interests are specially affected, should have been both 'extensive and virtually uniform',⁹ as well as 'constant'.¹⁰ The second is that the state practice should have been motivated, not by considerations of courtesy, convenience or tradition, but by *opinio juris*.¹¹
- (iii) The phrase 'general principles of law' appears to embrace principles common to many municipal legal systems, such as that one should not be a judge in one's own cause,¹² that both sides to a dispute should be fairly heard,¹³ that an injured party is entitled

⁸ Vienna Convention on the Law of Treaties 1969, Articles 53 and 64. For the purposes of that convention, a peremptory norm of general international law is 'a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. Rules of customary international law which are regarded as having the character of *jus cogens* appear to be those which outlaw acts of aggression and genocide; the rules which concern the basic rights of the human person, including protection from slavery and racial discrimination: *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Reports 1970, 3; which prohibit the use of force: *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v. USA) (Merits)*, ICJ Reports 1986, 14; and which recognize the equality of states and self-determination: *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v. USA) (Merits)*, per Judge Sette-Camara, separate opinion.

⁹ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, ICJ Reports 1969, 3.

¹⁰ *Asylum Case (Colombia v. Peru)*, ICJ Reports 1950, 266.

¹¹ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, ICJ Reports 1969, 3: Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation.

¹² *Mosul Boundary Case*, PCIJ Reports, Series B, No.12 (1925), 32.

¹³ *Diplomatic and Consular Staff in Tehran Case (USA v. Iran)*, ICJ Reports 1980, 3; *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v. USA) (Merits)*, ICJ Reports 1986, 14.

to be compensated,¹⁴ and the principles of equity.¹⁵ It appears to have been included as a source to be resorted to when no generally accepted rule of international law exists to which the court may have recourse.¹⁶

Religious and cultural tradition

Respect for human dignity and personality and a belief in justice are rooted deep in the religious and cultural traditions of the world. Hinduism, Buddhism, Judaism, Christianity and Islam all stress the inviolability of the essential attributes of humanity. Many of the moral values that underpin the contemporary international law of human rights are an integral part of these religious and philosophical orders.¹⁷ Witness the following conversation between the Buddha and his disciple, the Venerable Upali (circa 500 BC), in which was enunciated the rule of natural justice:

Q: Does an Order, Lord, that is complete carry out an act that should be carried out in the presence of an accused monk if he is absent?
Lord, is that a legally valid act?

A: Whatever Order, Upali, that is complete carries out an act that should be carried out in the presence of an accused monk. If he is absent, it thus comes to be not a legally valid act, not a disciplinarily valid act, and thus the Order comes to be one that goes too far.

¹⁴ *Chorzow Factory Case*, PCIJ Reports, Series A, No.17 (1928), 29.

¹⁵ For an exposition of the contribution of equity, see Individual Opinion of Judge Weeramantry, *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, ICJ Reports 1993, 210–79. According to him, the application of equity to a given case comprises the application of an equitable principle or principles, the adoption of an equitable procedure or procedures, the use of an equitable method, or the securing of an equitable result. For an earlier critique of the application of equity as a source of international law, see M. Akehurst, 'Equity and General Principles of International Law', (1976) 25 *International and Comparative Law Quarterly* 801.

¹⁶ *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Reports 1970, 3.

¹⁷ See John M. Peek, 'Buddhism, Human Rights and the Japanese State' (1995) 17 *Human Rights Quarterly* 527; L.C. Green, 'The Judaic Contribution to Human Rights' (1990) *Canadian Year Book of International Law* 3; Bassam Tibi, 'Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations', (1994) 16 *Human Rights Quarterly* 277; Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (New York: Syracuse University Press, 1990).

Q: Does an Order, Lord, that is complete carry out an act that should be carried out by the interrogation of an accused monk if there is no interrogation?

A: Whatever Order, Upali, that is complete carries out an act which should be carried out on the interrogation of an accused monk. If there is no interrogation, it thus comes to be not a legally valid act, not a disciplinarily valid act, and thus the Order comes to be one that goes too far.¹⁸

Contrary to assertions made by some political leaders in Asia that contemporary human rights concepts are Eurocentric in origin and conception, and therefore inconsistent with 'Asian values', reference to Asia's spiritual heritage demonstrates that respect for human rights is an integral part of the traditions of the East. For example, in the course of a ministry of forty-five years, the Buddha expounded a philosophy of life based upon tolerance and compassion in which the human mind was the principal element:

Mind is the forerunner of all evil states. Mind is chief; mind-made are they. If one speaks or acts with wicked mind, because of that, suffering follows one, even as the wheel follows the hoof of the draught-ox.¹⁹
Mind is the forerunner of all good states. Mind is chief; mind-made are they. If one speaks or acts with pure mind, because of that, happiness follows one, even as one's shadow that never leaves.²⁰

These poetic utterances of the Buddha, recorded in the first century AD from oral tradition, encompassed a wide variety of subjects. For instance, the need for an impartial tribunal:

He is not thereby just because he hastily arbitrates cases. The wise man should investigate both right and wrong;²¹

the rejection of penalties that cause unnecessary suffering:

All tremble at the rod. Life is dear to all. Comparing others to oneself, one should neither strike nor cause to strike;²²

¹⁸ I.B. Horner, trans. *The Book of the Discipline (Vinaya-Pitaka)*, volume IV: *Mahavagga or the Great Division IX* (London: Luzac & Co Ltd, 1962), 466–8.

¹⁹ Narada Thero, trans. *The Dhammapada* (Colombo Apothecaries' Co Ltd, 1972), verse 1.

²⁰ Narada Thero, trans. *The Dhammapada*, verse 2.

²¹ Narada Thero, trans. *The Dhammapada*, verse 256.

²² Narada Thero, trans. *The Dhammapada*, verse 130.

the sanctity of life:

If a person destroys life, is a hunter, besmears his hand with blood, is engaged in killing and wounding, and is not merciful towards living beings, he, as a result of his killing, when born amongst mankind, will be short-lived;²³

the futility of victory at war:

A man may spoil another, just so far
As it may serve his ends, but when he's spoiled
By others he, despoiled, spoils yet again.
So long as evil's fruits is not matured,
The fool doth fancy 'now's the hour, the chance !'
But when the deed bears fruit, he fareth ill.
The slayer gets a slayer in his turn;
The conqueror gets one who conquers him;
The abuser wins abuse, the annoyer, fret.
Thus by the evolution of the deed.
A man who spoils is spoiled in his turn;²⁴

the importance of *ahimsa* or non-violence:

Hatreds do not cease through hatred:
through love alone they cease;²⁵

the recognition of the supremacy of the human person:

By oneself, indeed, is evil done;
by oneself is one defiled.
By oneself is evil left undone;
by oneself, indeed, is one purified.
Purity and impurity depend on oneself.
No one purifies another;²⁶

the equality of the sexes:

A woman child, O Lord of men, may prove
Even better offspring than a male;²⁷

²³ Narada Maha Thera, *The Buddha and His Teachings* (Colombo: Associated Newspapers of Ceylon Ltd, 1972), 309.

²⁴ Narada Maha Thera, *The Buddha and His Teachings*, 201.

²⁵ Narada Thero, trans. *The Dhammapada*, verse 5.

²⁶ Narada Thero, trans. *The Dhammapada*, verse 165.

²⁷ Narada Maha Thera, *The Buddha and His Teachings*, 313.

the repudiation of slavery and the caste system:

Birth makes no brahmin, nor non-brahmin makes,
 'Tis life and doing that mould the brahmin true.
 Their lives mould farmers, tradesmen, merchants, serfs.
 Their lives mould robbers, soldiers, chaplains, kings;²⁸

the reciprocal duties of employers and employees:

A master should minister to servants and employees by

- i. assigning them work according to their strength,
- ii. supplying them with food and wages,
- iii. tending them in sickness,
- iv. sharing with them extraordinary delicacies, and
- v. relieving them at times.

The servants and employees, who are thus ministered to by their master, should:

- i. rise before him,
- ii. go to sleep after him,
- iii. take only what is given,
- iv. perform their duties satisfactorily, and
- v. spread his good name and fame;²⁹

and of parents and children:

In five ways a child should minister to his parents . . .

Once supported by them I will now be their support; I will perform duties incumbent on them; I will keep up the lineage and tradition of my family; I will make myself worthy of my heritage.

In five ways parents thus ministered to . . . by their child, show their love for him – they restrain him from vice, they exhort him to virtue, they train him to a profession, they contract a suitable marriage for him, and in due time they hand over his inheritance.³⁰

the duties of kingship:

²⁸ Narada Maha Thera, *The Buddha and His Teachings*, 309.

²⁹ Narada Maha Thera, *The Buddha and His Teachings*, 588.

³⁰ T.W and C.A.F. Rhys David (eds.), *The Dialogues of the Buddha* (Pali Text Society, 1977), 180–3, *Sigalovada Suttanta* (The Sigala Homily), cited in C.G. Weeramantry, *An Invitation to the Law* (Sydney: Butterworths, 1982), 248.

The first of the 'Ten duties of the King' is liberality, generosity, charity (*dana*). The ruler should not have craving and attachment to wealth and property, but should give it away for the welfare of the people.

Second: A high moral character (*sila*). He should never destroy life, cheat, steal and exploit others, commit adultery, utter falsehood, and take intoxicating drinks. That is, he must at least observe the Five Precepts of the layman.

Third: Sacrificing everything for the good of the people (*pariccaga*), he must be prepared to give up all personal comfort, name and fame, and even his life, in the interest of the people.

Fourth: Honesty and integrity (*ajjava*). He must be free from fear or favour in the discharge of his duties, he must be sincere in his intentions, and must not deceive the public.

Fifth: Kindness and gentleness (*maddava*). He must possess a genial temperament.

Sixth: Austerity in habits (*tapa*). He must lead a simple life, and should not indulge in a life of luxury. He must have self-control.

Seventh: Freedom from hatred, ill-will, enmity (*akkodha*). He should bear no grudge against anybody.

Eighth: Non-violence (*avihimsa*), which means not only that he should harm nobody, but also that he should try to promote peace by avoiding and preventing war, and everything which involves violence and destruction of life.

Ninth: Patience, forbearance, tolerance, understanding (*khanti*). He must be able to bear hardships, difficulties and insults without losing his temper.

Tenth: Non-opposition, non-obstruction (*avirodha*), that is to say that he should not oppose the will of the people, should not obstruct any measures that are conducive to the welfare of the people. In other words, he should rule in harmony with his people;³¹

the relevance of the welfare state:

Planters of groves and fruitful trees
And they who build causeways and dams
And wells construct, and watering sheds
And (to the homeless) shelter give –
Of such as these by day and night
For ever doth the merit grow

³¹ Walpola Rahula, *What the Buddha Taught* (Bedford: The Gordon Fraser Gallery Ltd, 1959), 1967 edition, 85.

In righteousness and virtue might
Such folk from earth to Nirvana go;³²

and the freedom of thought, belief and expression:

Do not accept anything on mere hearsay (i.e. thinking that thus have we heard it from a long time). Do not accept anything by mere tradition (i.e. thinking that it has thus been handed down through many generations). Do not accept anything on account of rumours (i.e. by believing what others say without any investigation). Do not accept anything just because it accords with your scriptures. Do not accept anything by mere supposition. Do not accept anything by mere inference. Do not accept anything by merely considering appearances. Do not accept anything merely because it agrees with your pre-conceived notions. Do not accept anything merely because it seems acceptable (i.e. should be accepted). Do not accept anything thinking that the ascetic is respected by us (and therefore it is right to accept his word).

But when you know for yourselves – these things are immoral, these things are blameworthy, these things are censured by the wise, these things when performed and undertaken conduce to ruin and sorrow – then indeed do you reject them.

When you know for yourselves – these things are moral, these things are blameless, these things are praised by the wise, these things when performed and undertaken conduce to well-being and happiness – then do you live and act accordingly.³³

Quite early in his ministry, the Buddha urged his *bhikkus* to travel ‘for the welfare of the many, for the happiness of the many, through compassion for the world, for the welfare, benefit and happiness of gods and man’.³⁴ This obligation, imposed on his disciples for the purpose of spreading his teachings, carries with it, by implication, the freedom of movement. The *Mahaparinibbanasutta* of the *Dighanikaya* states that, firstly, people must ‘assemble frequently’; secondly, they should ‘assemble peacefully or in unison’ (*samagga samipatanti*), ‘arise peacefully’ (*samagga vutthahanti*), and ‘transact business peacefully’ (*samagga vajjikaraniyani karonti*).³⁵

³² Mrs Rhys David, trans. *The Book of Kindred Sayings (Sanyutta Nikaya)*, (London: OUP, 1917).

³³ Narada Maha Thera, *The Buddha and His Teachings*, 284.

³⁴ 1 *Vinayapitaka* 21 (London, Pali Text Society), cited in Horace Perera (ed.), *Human Rights and Religions in Sri Lanka* (Colombo: Sri Lanka Foundation, 1988), 107.

³⁵ 2 *Dighanikaya* 73, cited in Horace Perera (ed.), *Human Rights and Religions in Sri Lanka* (Colombo: Sri Lanka Foundation, 1988), 175.

Philosophical thought

This religious and cultural tradition that emphasized the inviolability of the human person was complemented by many strands of philosophical thought that unfolded the concept of a natural law that was equally inviolable and to which all man-made law must conform.³⁶ Aristotle (384–322 BC) explained that a rule of justice is natural that has the same validity everywhere, and does not depend on its acceptance. He distinguished natural law from rules of justice based on convention and expediency, which he compared to standard measures. ‘Corn and wine measures are not equal in all places, but are larger in wholesale and smaller in retail markets. Similarly the rules of justice ordained not by nature but by man are not the same in all places, since forms of government are not the same, though in all places there is only one form of government that is natural, namely, the best form.’³⁷ Cicero (106–43 BC) also conceived of a higher law which ‘is of universal application, unchanging and everlasting’. He described it as a law not taught or learnt from books but ‘drawn from Nature herself, in which we have never been instructed . . . but which is inborn in us’.³⁸ ‘For reason did exist, derived from the Nature of the universe, urging men to right conduct and diverting them from wrong-doing, and this reason did not first become Law when it was written down, but when it first came into existence; and it came into existence simultaneously with the divine mind.’

He compared that law ‘made in agreement with that primal and most ancient of all things, Nature’, to ‘the many deadly, the many pestilential statutes which nations put in force. These no more deserve to be called laws than the rules a band of robbers might pass in their assembly’.³⁹

Over 1,600 years later, Hugo Grotius, in his treatise *De Jure Belli Ac Pacis* (1625), drew upon human reason as the basis of natural law. ‘The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature,

³⁶ For a discussion of the law of nature, see H. Lauterpacht, *International Law and Human Rights* (Archon Books, 1968 reprint), 73–140.

³⁷ Aristotle: *The Nicomachean Ethics*, Books I–X, tr. H. Rackham (London: Heinemann, 1975).

³⁸ C.G. Weeramantry, *An Invitation to the Law* (Sydney: Butterworths, 1982), 197.

³⁹ Marcus Tullius Cicero, *De Republica*, tr. G.H. Sabine and S.B. Smith (Indianapolis: Bobbs-Merrill, 1976).

God'.⁴⁰ John Locke, in his *Second Treatise on Government* (1689) asserted the superiority of natural law over positive law:⁴¹

222. . . . Whosoever, therefore, the legislative shall transgress this fundamental rule of society, and, either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties and estates of the people, by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and, by the establishment of a new legislative (such as they shall think fit), provide for their own safety and security, which is the end for which they are in society.⁴²

And, in the eighteenth century, the 'Age of Enlightenment', a galaxy of European political thinkers, including Montesquieu, Voltaire, Beccaria and Paine, consolidated a doctrine of liberty and equality that had a profound influence on political developments on their continent and beyond. Among them, Jean-Jacques Rousseau, in *The Social Contract* (1762), affirmed that sovereignty remained throughout with the people. 'So long as a people is constrained to obey, and obeys, it does well; but as soon as it can shake off the yoke, and shakes it off, it does better; for since it regains its freedom by the same right as that which removed it, a people is either justified in taking back its freedom, or there is no justifying those who took it away'.⁴³

Transforming philosophy into law

The early municipal codifications of individual rights were compacts between the rulers and privileged sections of the community. For example, the Magna Carta of 1215, signed by King John of England at Runnymede, was exacted by the feudal barons and was intended to protect their interests. It did, however, contain certain provisions which have since been construed to be of general application. For example,

⁴⁰ Hugo Grotius, *Of the Law of War and Peace*, tr., F.W. Kelsey (Indianapolis, Bobbs Merrill, 1957).

⁴¹ Positivists argued the supremacy of the law of a sovereign state.

⁴² John Locke, *Political Writings*, David Wootton (ed.) (London: Penguin Books, 1993).

⁴³ Jean-Jacques Rousseau, *The Social Contract and Discourses*, J.H. Brummfitt and J.C. Hall, eds. (London: Dent, 1973).

39. No freeman shall be taken or imprisoned, or disseized, or outlawed, or exiled or in any way harmed – nor will we go upon him or send upon him – save by the lawful judgment of his peers or by the law of the land.

40. To none will we sell, to none deny or delay, right or justice . . .

42. Henceforth any person, saving fealty to us, may go out of our realm and return to it, safely and securely, by land and by water, except perhaps for a brief period in time of war, for the common good of the realm.

Similarly, the English Bill of Rights of 1689 was the basis upon which Parliament negotiated the accession to the throne of William and Mary, Prince and Princess of Orange. Many of its provisions were intended to protect the rights of Parliament, although at least one was more general in nature: ‘(10) That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.’⁴⁴

While these concessions were obtained by feudal barons and the affluent gentry for themselves alone, the real significance of these charters lies in the fact that each constituted a limitation of the power of the then absolute monarch. As Lauterpacht has observed, ‘the vindication of human liberties does not begin with their complete and triumphant assertion at the very outset; it commences with their recognition in *some* matters, to *some* extent, for *some* people, against *some* organ of the state’.⁴⁵

Standards founded upon the doctrines of ‘social contract’ and ‘natural law’ were embodied in the first domestic Bill of Rights – the Virginia Declaration of Rights 1776. In it, the people of Virginia, through their representatives assembled at a convention, proclaimed that ‘all men are by nature equally free and independent, and have certain inherent rights,

⁴⁴ The *Encyclopaedia Britannica* (Macropaedia), volume VIII, 15th edn, 1977, refers to two earlier codifications: in 1188, the Cortes, the feudal assembly of the Kingdom of Leon (on the Iberian Peninsula) received from King Alfonso IX his confirmation of a series of rights, including the right of an accused to a regular trial and the right to the inviolability of life, honour, home and property; in 1222, the Golden Bull of King Andrew II of Hungary guaranteed, *inter alia*, that no noble would be arrested or ruined without first being convicted in conformity with judicial procedure. C.G. Weeramantry, in his *Invitation to the Law* (Sydney: Butterworths, 1982), cites several edicts of Asoka, the Buddhist Emperor of India (269–232 BC), one of which was the Edict of Toleration: ‘a man must not do reverence to his own sect or disparage that of another man without reason. Deprecation should be for specific reasons only, because the sects of other people all deserve reverence for one reason or another.’

⁴⁵ H. Lauterpacht, *International Law and Human Rights* (Archon Books, 1968 reprint), 131.

of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety'. The Declaration proclaimed a compendium of impressive principles including: (i) that all power is vested in, and consequently derived from, the people; (ii) that when a government is found to be inadequate, a majority of the community has an indubitable, unalienable, and indefeasible right to reform, alter or abolish it; (iii) that the legislative and executive powers of the state should be separate and distinct from that of the judiciary; (iv) that the election of people's representatives ought to be free, and that all men have the right of suffrage, and cannot be taxed or deprived of their property for public purposes without their own consent; (v) that an accused person has a right to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; (vi) that no man be deprived of his liberty except by the law of the land, or the judgment of his peers; (vii) that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; (viii) that general warrants, whereby any officer may be commanded to search suspected places without evidence of a fact committed, ought not to be granted; (ix) that the freedom of the press is one of the great bulwarks of liberty, and can never be restrained; (xi) that the military should be under strict subordination to, and governed by, the civil power; (xii) and that all men are equally entitled to the free exercise of religion, according to the dictates of conscience.⁴⁶

On 4 July 1776, in the American Declaration of Independence, the representatives of thirteen states assembled in congress affirmed that 'all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of their happiness', and that 'to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, and that whenever any form of government becomes

⁴⁶ The Virginia Declaration of Rights 1776 was followed in quick succession by similar declarations in the Constitutions of Pennsylvania, Maryland, Delaware, New Jersey, North Carolina, South Carolina, New York, New Georgia and Massachusetts.

destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundations on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness'. The Constitution of the United States of America of 1787 provided, *inter alia*, that the writ of habeas corpus should not be suspended, and no bill of attainder or *ex post facto* law should be passed. The amendments of 1791, 1865, 1868, 1870, and 1920 added other rights to constitute a relatively comprehensive and enforceable Bill of Rights. Meanwhile, on 27 August 1789, the representatives of the French people, organized as a National Assembly, proclaimed the Declaration of the Rights of Man and of the Citizen. A product of the French Revolution, and undoubtedly inspired by the American experience and influenced by the philosophical discourse of the age, this document contained a statement of the 'natural, inalienable, and sacred rights of man'. Philosophy was being translated into law.⁴⁷

The doctrine of state sovereignty

The principal obstacle to the development of the international law of human rights was the rule of customary international law that recognized the doctrine of state sovereignty. According to that rule, a sovereign state had full, complete and exclusive authority to deal with its own territory and with its own nationals. It followed that international law did not permit any interference or intervention by any other state, or by the community of states, in respect of either of these matters. Accordingly, a state was free to deal with its own nationals in whatever way it chose to. In particular, it alone had the right to determine the subject-matter and content of its domestic laws. In the context of the doctrine of state sovereignty, it was inconceivable that international law could vest an individual with any rights exercisable against his own state.⁴⁸

⁴⁷ According to Lauterpacht, in the nineteenth century the recognition of fundamental rights in the constitutions of states became 'a general principle of the constitutional law of civilized states'. He cites Sweden (1809), Spain (1812), Norway (1814), Belgium (1831), Liberia (1847), Sardinia (1848), Denmark (1849), Prussia (1850) and Switzerland (1874). See Lauterpacht, *International Law*, 89.

⁴⁸ An alien, however, was entitled under international law to be treated in accordance with minimum standards of civilization, including the right to personal liberty and the right to equality before the law. This was an obligation which the state owed to the other state of

Humanitarian norms as international law

The doctrine of state sovereignty, in so far as it related to the treatment by a state of its own nationals, began to be eroded, however, by the incorporation of certain humanitarian norms in international law. This was a gradual process which began in the early nineteenth century.

- i. By the Treaty of Paris 1814, the British and French governments agreed to co-operate to suppress the traffic in slaves. After several such bilateral agreements, the General Act of the Berlin Conference on Central Africa 1885 declared that 'trading in slaves is forbidden in conformity with the principles of international law as recognized by the signatory powers'. Following agreement on other measures, such as the right of visit and search, and the confiscation of ships engaged in the slave trade, provided for in the General Act of the Brussels Conference 1890, an International Convention on the Abolition of Slavery and the Slave Trade was concluded in 1926. Its object was 'the complete suppression of slavery in all its forms and of the slave trade by land and sea'.
- ii. A Swiss philanthropist, Henry Dunant, who had observed the suffering of sick and wounded soldiers in the Battle of Solferino fought between French and Austrian armies in northern Italy in 1859, took the initiative in establishing the International Committee for Aid to the Wounded (later renamed the International Committee for the Red Cross). Due to his efforts, a diplomatic conference was convened in Geneva in 1864 at which sixteen European states adopted the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (the First Geneva Convention). In it they undertook to care for sick and wounded soldiers irrespective of their nationality, and to return home captured wounded soldiers if they were incapable of further military service. At the Hague Peace Conferences of 1899 and 1907, it was agreed to extend these principles to the sick and wounded in naval warfare, and to prohibit certain practices, including the bombardment of undefended towns, the use of poisonous gases and soft-nosed bullets.⁴⁹

which the alien was a national. The irony of this situation lies in the fact that an individual was better protected under the law when he was outside the jurisdiction of his own state.

⁴⁹ Four new conventions replacing the existing ones were adopted at an international diplomatic conference held in Geneva in 1949. These covered the sick and wounded on land

- iii. On the initiative of groups of social reformers, governments meeting in Berne in 1906 agreed upon two multilateral labour conventions. One prohibited night work for women employed in industrial establishments, and the other prohibited the use of the inflammable white phosphorus in the manufacture of matches. With the establishment of the International Labour Organization in 1919, a succession of other conventions designed to regulate working conditions was concluded.
- iv. The map of Europe was redrawn as part of the peace settlement of 1919 following the end of the First World War. An integral part of the peace settlement was a series of treaties in which provision was made – with the League of Nations as guarantor – for the protection of the rights of minorities living within the newly carved boundaries of several European states. The rights protected included their freedom of religion, the right to use their own language, and the right to maintain their own religious and educational establishments. A complaints procedure was also instituted, enabling individuals to invoke personal rights in any international forum against the state of which they were nationals.⁵⁰

An international consensus on human rights

These were the only areas in which the doctrine of state sovereignty had begun to erode, and where the international community could presume to judge, or even legitimately express its concern at, a government's treatment of its own citizens. But the Second World War and the events that preceded it in Germany (and in the territories under German occupation), where unprecedented atrocities were perpetrated on millions of its own citizens by the regime then lawfully in power, demonstrated how

(First Convention); wounded, sick and shipwrecked members of the armed forces at sea (Second Convention); prisoners of war (Third Convention), and civilian victims (Fourth Convention). In 1977, at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, two Additional Protocols to the 1949 Conventions were adopted. Protocol I deals with the protection of victims of international conflicts. Protocol II concerns the victims of internal armed conflicts, including those between the armed forces of a government and dissidents or other organized groups which control part of its territory.

⁵⁰ See *Steiner and Gross v. The Polish State*, Upper Silesian Arbitral Tribunal, Cases Nos. 188 and 287, *Annual Digest* 1927–8; *Minority Schools in Albania*, PCIJ Reports 1935, Series A/B, No.64.

hopelessly inadequate international law was. According to the strict doctrine of state sovereignty, any foreign criticism of the domestic laws that authorized these atrocities was illegitimate; according to the theory of legal positivism, it was also meaningless.⁵¹ Unless there was established a set of superior standards to which all national law must conform – an overriding code of international human rights law – history could well repeat itself.⁵²

President Roosevelt articulated his vision of this world order in his annual message to the United States Congress on 6 January 1941. He spoke of a world founded upon four essential human freedoms: freedom of speech and expression, freedom to worship, freedom from want, and freedom from fear. It was to be a definite basis for a kind of world attainable in our own time and generation. Later that year, in the Atlantic Charter of 14 August 1941, the President of the United States of America and the Prime Minister of the United Kingdom, affirmed their commitment to ‘certain common principles in the national policies of their respective countries on which they base their hopes for a better future of the world’. These included (i) no aggrandizement, territorial or other; (ii) no territorial changes that do not accord with the freely expressed wishes of the peoples concerned; (iii) respect for the right of peoples to choose the form of government under which they live, and restoration of sovereign rights and self-government to those forcibly deprived of them; (iv) enjoyment by all states of access, on equal terms, to the trade and raw materials of the world; (v) improved labour standards, economic adjustment and social security; (vi) freedom from fear and want everywhere; (vii) a peace that would enable everyone to traverse the high seas and oceans without hindrance; and (viii) the abandonment of the use of force and the encouragement of disarmament.

These principles were reaffirmed in the Declaration of the twenty-six United Nations of 1 January 1942; in the Declaration of Moscow of

⁵¹ Paul Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983), 14.

⁵² For a fascinating account of the development of international human rights law written by the person who served as Director of the Human Rights Division of the United Nations from 1946–66 and, therefore, actively participated in all the principal events of that momentous period, see John P. Humphrey, *Human Rights and the United Nations: a Great Adventure* (New York: Transnational Publishers Inc., 1984). For a study of the influence on the text of the Universal Declaration of Human Rights of Adolf Hitler and his policies of National Socialism, see Johannes Morsink, ‘World War Two and the Universal Declaration’ (1993) 15 *Human Rights Quarterly* 357.

30 October 1943 made by the Foreign Ministers of the United States, the United Kingdom, China and the Soviet Union; and in the Declaration of Teheran of 1 December 1943 made by the President of the United States, the Prime Minister of the United Kingdom, and the Premier of the Soviet Union. Proposals for the establishment of an international organization were agreed on by the representatives of the United States, the United Kingdom, China and the Soviet Union at a conference held at Dumbarton Oaks, Washington in 1944; the Dumbarton Oaks Proposals were signed on 7 October 1944. In the Yalta Agreement of 11 February 1945, President Roosevelt, Prime Minister Churchill and Premier Stalin decided to summon a United Nations Conference on the proposed world organization for 25 April 1945. The Charter was drafted at that conference, and was adopted on 25 June and signed on 26 June, with fifty-five nations participating. It became operative upon the ratification by the required number of signatory states on 24 October 1945.

The Charter of the United Nations

The Charter of the United Nations was the standard-bearer, the first of several international treaties that helped to create an international human rights regime. Its preamble reaffirmed 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women'. One of the principal purposes of the United Nations was declared to be the achievement of 'international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion'.⁵³ Article 55(c) states that, with a view to the creation of conditions of stability and well-being, the United Nations 'shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. This is a mandatory obligation imposed on the organization. In Article 56, 'All Members pledge themselves to take joint and separate action in co-operation with the Organization' for the achievement of the purpose set forth in Article 55(c). This is a legal obligation undertaken by the signatories to the Charter of 26 June 1945, and those other sovereign states which in later years were to contribute towards the universality of

⁵³ Article 1.

the United Nations. This legal duty to promote respect for human rights necessarily includes the legal duty to respect them.⁵⁴

The effect of Article 56 is to require each member state of the United Nations to take action, both collectively with other signatory states and separately (within their domestic jurisdictions), to secure 'universal respect' for, and 'observance' of, human rights and fundamental freedoms. Since the requirement arises out of a treaty voluntarily entered into by each state, the obligation is binding. By requiring the Economic and Social Council (which was one of the organs the Charter established) to 'make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all', including the preparation of draft conventions for submission to the General Assembly, the Charter obviously intended that the formulation of standards and of methods of enforcement would follow under the auspices of the United Nations.

The existence of a legal duty is not dependent upon the existence of a sanction for failure to perform that duty. Accordingly, Lauterpacht argued that irrespective of the question of definition or enforcement, the Charter imposed upon the member states of the United Nations the legal duty to respect fundamental rights.

The Charter of the United Nations is a legal document; its language is the language of the law, of international law. In affirming repeatedly the 'fundamental human rights' of the individual it must necessarily be deemed to refer to legal rights – to legal rights recognized by international law and independent of the law of the State. These rights are only imperfectly enforceable, and, in so far as the availability of a remedy is the hallmark of legal rights, they are imperfect legal rights. Yet in the sphere of international law the correlation of right and remedy is not so close as within the State. Moreover, irrespective of the question

⁵⁴ Sieghart explains that, as a matter of construction, the obligation in Article 56 is an obligation to take *action* to *achieve* the purposes set forth in Article 55, and the word 'promote' in that article merely introduces those purposes, and does not itself form part of them. The purpose is 'universal respect for, and observance of, human rights and fundamental freedoms' and it is this – and not its promotion – which the states parties 'pledge' themselves to take action to achieve: Paul Sieghart, *International Law of Human Rights*, 52. See also Lauterpacht, *International Law*, 152. It must be noted, however, that this rhetoric was not matched by domestic performance at the time. For example, the United States practised racial discrimination, the United Kingdom and several other European states had colonial empires, and the Soviet Union ruthlessly punished its dissidents.